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NO. 80-1916

IN THE
SUPREME COURT OF THE UNITED STATES

October term, 1981

DAVID T. RICHARDS, and RICHARD G. FIFER, JR.,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

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TABLE OF CONTENTS

PAGE

QUESTION PRESENTED

WHETHER THE PETITIONERS HAVE ESTABLISHED THAT THIS COURT SHOULD ASSUME ITS DISCRETIONARY JURISDICTION OVER THE INSTANT CASE ON THE BASIS OF EITHER THE EXISTENCE OF A REAL AND EMBARASSING CONFLICT OF AUTHORITIES INVOLVED IN THE LOWER COURT'S DETERMINATION OR THE EXISTENCE OF ISSUES OF GREAT PUBLIC IMPORTANCE BEYOND THAT OF THE IMMEDIATE LITIGANTS ON THE LAW REGARDING THE COAST GUARD'S AUTHORITY TO CONDUCT SAFETY INSPECTIONS PURSUANT TO TITLE 14, U.S.C. SECTION 89(a)?

TABLE OF AUTHORITIES ---------- ii,iii

STATEMENT OF THE CASE ---------- 1 - 2

ARGUMENT AGAINST GRANTING THE WRIT ---------- 3 - 14

CONCLUSION ---------- 15

CERTIFICATE OF SERVICE -------- 16

TABLE OF AUTHORITIES

PAGE

Delaware v. Prouse,
440 U.S.433(1979)--------- 3,4,6,8,9 11,13,14

U.S. v. Arra,
630 F.2d 236(1st Cir. 1980)---- 4,6

U.S. v. Demanett,
629 F.2d 862(3rd Cir. 1980)----- 4,5 13

U.S. v. Harper,
617 F.2d 35(4th Cir. 1980)
cert.denied __U.S.__,
101 S.Ct. 243 ---------- 5,8,9

U.S. v. Hill,
626 F.2d 1340(5th Cir. 1980) ----12

U.S. v. Hilton,
619 F.2d 127(1st Cir. 1980) ----- 4

U.S. v. Jones,
639 F.2d 200(5th Cir. 1981) -----13

U.S. v. Pinier,
608 F.2d 358(9th Cir. 1979) ---5,11

U.S. v. Shelnut,
625 F.2d 59(5th Cir. 1980)
cert.denied, __U.S.__,
101 S.Ct. 1520 ---------- 7,8

Page

U.S. v. Williams,
617 F.2d 1063(5th Cir. 1980)-----8

14 U.S.C., Section 89(a) --------3,6,8
13,14

Rule 28(4)(b)U.S.C. ---------- 4

28 U.S.C. 1403(a) ---------- 4

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STATEMENT OF THE CASE

The Respondent accepts the Petitioners' Statement of the Case subject to the following additions:

Petty Officer Weisman testified at the hearing on the motion to suppress that his vessel had been on safety patrol at the Port Everglades Inlet since one o'clock in the morning, and prior to boarding the Petitioners' boat, he had boarded other vessels that came through the inlet and performed safety inspections. The Coast Guard officers, in the course of the safety inspection of the Petitioners' vessel, asked to see the fire extinguishers and were told they were located in the cabin. When Officer Weisman opened the

cabin door, he immediately smelled an odor that he recognized as marijuana, and observed stacked bales covered with a cloth.

ARGUMENT AGAINST GRANTING THE WRIT

The Petitioners have advanced four grounds as a basis for their Petition. The Respondent maintains none of them are sufficient to warrant this Court's exercise of its discretionary certiorari jurisdiction.

The first ground argued by Petitioners is that the decision below raises a significant federal question calling into question the constitutional validity of Title 14 U.S.C. 89 (a) under the Fourth Amendment in view of this Court decision in Delaware

v. Prouse, 440 U.S. 648 (1979)[1]. Respondent maintains this federal question has already been satisfactorily answered by the Circuit Courts of Appeal, which have continued to uphold the constitutionality of Section 89 (a) and rejected contentions that Delaware v. Prouse compels a contrary result. United States v. Hilton, 619 F. 2d 127 (1st Cir. 1980); United States v. Arra, 630 F. 2d 236 (1st Cir. 1980); United States v. Demanett, 629 F. 2d 862 (3rd Cir. 1980), cert. denied, __ U.S. __,

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(1) It appears that pursuant to Rule 28 (4)(b) of the rules of this Court Petitioners are obligated to notify the solicitor general of the pendency of this proceeding and their Petitions should recite that 28 U.S.C. 2403(a) may be applicable.

101 S. Ct. 1347; United States v. Harper, 617 F. 2d 35 (4th Cir. 1980) cert. denied __ U.S. __, 101 S. Ct. 243, United States v. Espinosa-Cerpa, 630 F. 2d 328 (5th Cir. 1980). The Ninth Circuit's decision in United States v. Pinier, 608 F. 2d 358 (9th Cir. 1979), did not hold Section 89(a) invalid; it merely held that safety inspections after dark could not be conducted without some reasonable suspicion of non compliance with safety regulations (2). Therefore the expressed concern of the court below, (See footnote 5 of its Opinion), that although there are

(2) Of course Pinier is factually distinguishable from this case since the inspection here was conducted at 7:00 A.M.

obvious differences between a land-locked vehicle and an oceangoing vessel, the law of the sea may be in flux, has not been born out since the Courts of Appeal subsequent to Delaware v. Prouse have continued to hold Section 89(a) constitutional.

Likewise the Petitioners' argument that the decision below conflicts with this Court's decision in Delaware v. Prouse is without merit. As already noted, the Courts of Appeal considering this question have found Delaware v. Prouse inapplicable to Coast Guard safety inspections conducted pursuant to Section 89(a). In Delaware v. Prouse this Court recognized the government had a legitimate interest in ensuring

that only licensed persons operate motor vehicles but held this interest could be served by a less intrusive means than random stops; for example, by a roadblock type check. In United States v. Arra, 630 F. 2d 836 (1st Cir. 1980) the Court held the government has a legitimate interest in ensuring that vessels have safety equipment and are properly registered and there was no practical alternative means for achieving these objectives other than random stops, since obviously road blocks can not be set up in the ocean and in-port inspections would by pass vessels that don't call. In United States v. Shelnut, 625 F. 2d 59 (5th Cir. 1980), cert.denied __ U.S.

__, 101 S.Ct. 1520, the Court found nothing in Delaware v. Prouse to suggest it was applicable to Coast Guard inspections. The Fifth Circuit also noted in United States v. Williams, 617 F. 2d 1063 (5th Cir. 1980) (en banc), that historically customs and Coast Guard officers have had the authority to board and search vessels, and it held that under Section 89(a), it is reasonable to allow the Coast Guard to board ships and conduct safety inspections. Citing the obvious differences between landlocked vehicles and vessels, the Court held a Coast Guard safety inspection is not violative of the Fourth Amendment.

Alternatively, assuming arguendo that Delaware v. Prouse is deemed by the Court to have some applicability to safety inspections of vessels, Respondent submits that in this case, the decision below is not in conflict with Delaware v. Prouse since the stop of Petitioners' vessel was the equivalent of a roadblock type stop specifically approved in that decision. The coast guard officers in this case were stationed by the Port Everglades Inlet with orders to stop and conduct safety inspections on the vessels entering the inlet; and prior to the stop of Petitioners' vessel, they had stopped and inspected others. A similar factual situation occurred in United States

v. Harper, 617 F. 2d 35 (4th Cir. 1980), cert.denied __ U.S. __, 101 S. Ct. 143. In that case, the coast guard had a policy to stop all vessesl of a certain size in certain areas of the United States coast and all vessels passing the point where the Defendant's ship was stopped were boarded. The Court found the stop in Harper analogous to the roadside inspection approved in Delaware v. Prouse. Thus the decision below is consistent with and not contrary to this Court's opinion in Deleware v. Prouse.

The Petitioners' claim that the decision below, while consistent with the case law in the Federal Fifth Circuit, conflicts with the Ninth Cir-

cuit's decision in United States v. Pinier, 608 F. 2d 358 (9th Cir. 1979), is based on too broad a reading of Pinier. In Pinier the Court merely held that the random stop of vessels after dark for safety inspections was unreasonable; it declined to address the government's argument that Delaware v. Prouse was distinguishable and assumed arguendo that the government's interest in safety outweighed the individual's interest in privacy in an ordinary boarding. In the instant case the safety inspection took place at 7: A.M., dawn, and thus Pinier is inapplicable so there is no conflict.

The Petitioners' contention that the decision below also conflicts with

other authority on the issue of "pretext" searches is not supported by the cases cited, which stand for the proposition that evidence discovered in the course of an illegal traffic stop must be suppressed. The Court below properly held that the issue is not the officers' subjective intent, but what they actually did. In this case, the undisputed evidence was that the officers discovered the marijuana in the course of a safety inspection, specifically, while they were looking for the ship's fire extinguishers. Therefore, the contraband was validly discovered under the plain view doctrine and thus admissible. United States v. Hill, 626 F. 2d 1340, 1301 n.1 (5th Cir.

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1980); United States v. Demanett, 629 F. 2d 862 (3rd Cir. 1980), cert.denied __ U.S. __, 101 S.Ct. 1347; United States v. Jones, 639 F. 2d 200 (5th Cir. 1981).

Finally, the Petitioners ask this Court to grant certiorari because the State appellate court construed a federal statute, i.e., Title 14 USC Section 89(a). This is not one of the considerations listed in Rule 17 of the rules of this Court, and Respondent maintains it is not an appropriate ground for granting jurisdiction in this case. There have been numerous federal cases construing Delaware v. Prouse since the opinion below was rendered, and in these cases the Courts

have held Delaware v. Prouse does not affect the validity of Section 89(a) and it does not require any particularized suspicion in order to stop vessels for safety inspections (See cases cited and discussed, infra). Therefore, in the instant case, the State appellate court's construction of Section 89(a) is consistent with Federal case law and the Petitioners have failed to establish that this Court should grant certiorari.

CONCLUSION

Based upon the foregoing reasons and authorities cited therein, Respondent respectfully requests that this Court DECLINE to assume jurisdiction in this case and DENY Petitioners' application for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing have been furnished this ____ day of _____, 1981, to Edward M. Kay, Esquire and Douglas J. Glaid, Esauire, Attorneys for Petitioners, 510 Southeast Seventeenth Street, Fort Lauderdale, Florida 33316, by U,S, Mail.

Of Counsel